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Supreme Court, U.S.
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No. 96-1563

In The

Supreme Court of the United States

October Term, 1996

SC TESTING TECHNOLOGY, INC., *et al.*,

Petitioners,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

The arguments advanced by Respondents in their Brief in Opposition do not withstand analysis. Instead, they are proof positive that Respondents' position, and the ruling below, directly conflict with federal law.

1. Once the Revised SIP was approved by EPA, the State could not amend the SIP without EPA approval.

Respondents contend that "since EPA could not have required the State of Maine to enact a law like the MVEIP law in the first instance, it makes no sense to say that its conditional approval of a plan incorporating that law gave the agency the power to prohibit the law's repeal." Respondents' Brief in Opposition ("Respondents' Brief") at 12. This argument directly contradicts a long line of cases in this Court and the federal courts of appeal holding that states can be bound by plans they submit to federal agencies to comply with Congressionally mandated programs, even if the federal government could not absent such submission have required the state to adopt the implementing legislation. *See, e.g., Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 289 (1981); *Friends of the Earth v. Carey*, 552 F.2d 25, 34-39 (2d Cir. 1977), cert. den. 434 U.S. 902 (1977), cited with approval in *Hodel*, 452 U.S. at 290 (re: Clean Air Act).

The State's argument also directly contradicts EPA's regulations, which require EPA approval of any plan revision before it becomes effective. 40 C.F.R. § 51.105; *see Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 813 (D.C. Cir. 1975) ("If unilateral

state action served to relax its implementation schedule pending EPA approval, any state could sidestep the crucial limitations on the revision procedure and undermine the national program of air quality improvement.")

2. The Revised SIP was part of Maine's approved SIP at the time of the repeal.

Respondents argue at length that the Revised SIP "never became part of Maine's applicable, approved SIP." Respondents' Brief at 16. Their argument is inconsistent with the text of the statute, EPA's interpretation of the statute, and all federal cases that have considered the effect of conditionally approved SIP's.

Both Petitioners and Respondents agree that the Clean Air Act's definition of "applicable implementation plan" is of critical significance, since that definition controls the express preemption provisions of 42 U.S.C. § 4216. "Applicable implementation plan" is defined in 42 U.S.C. § 7602(q) as "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under [42 U.S.C. § 7410]. . . . " Section 7602(q) does not distinguish between the various subsections of § 7410, which deal with both full and partial approvals [§ 7410(k)(3)] and conditional approvals [§ 7410(k)(4)]; § 7602(q) instead states unequivocally that a portion of a plan approved under any section of § 7410 becomes part of the "applicable implementation plan." This Court must give effect to the plain language of the statute, *see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 474, 475 (1992), and that plain meaning requires that a SIP conditionally approved under § 7410(k)(4) be included in

the "applicable implementation plan" with the same effect as a SIP fully or partially approved under § 7410(k)(3).

Respondents' position is also in direct contradiction with the interpretation of EPA, the agency charged with implementing the Clean Air Act, and all federal courts that have considered the issue. The Director of EPA's Air Quality Management Division issued a memorandum to Regional Air Program Directors, after adoption of the 1990 Clean Air Act Amendments, stating that conditionally approved SIP's are enforceable and are part of the State's SIP. Memorandum from John Calcagni, Director, Air Quality, Management Division, EPA, to Regional Air Program Directors, "Processing of State Implementation (SIP) Submittals," July 7, 1992, quoted in Petitioners' Petition for Writ of Certiorari at 11, n.10. That administrative interpretation is entitled to "considerable weight- . . . and deference," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984), and Respondents have shown no reason why EPA's interpretation should not be given effect.[1] The federal courts that have considered the issue also unanimously concluded, both before and after the 1990 Clean Air Act Amendments, that conditionally approved SIP's must be enforceable. *McCarthy v. Thomas*, 27 F.2d 1363, 1369 (9th

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[1] Respondents dismiss the Calcagni memorandum because it was brought to the attention of the Maine Law Court in a reply brief, and "EPA's official interpretations of the provisions of the Clean Air Act were not made a part of the record below." Respondents' Brief at 16, n. 3. EPA's interpretations are a matter of law, not fact, and can be cited to the court below and this Court at any time.

Cir. 1994); *Natural Resources Defense Council v. EPA*, 22 F.3d 1125, 1133-35 (D.C. Cir. 1994).

Respondents' argument boils down to this: the Clean Air Act should be interpreted to permit a State to eviscerate a portion of its conditionally approved SIP, through repealing an entire emission testing program included in its SIP; assert its own repeal as a breach of the conditions imposed by EPA, in order to nullify the SIP; and thereby escape from the express preemption provisions of the Clean Air Act, which would otherwise prohibit the repeal. Respondents' Brief at 15. The argument is facially absurd: the State cannot assert its own deliberate breach of its commitments under its Revised SIP to avoid the clear Congressional mandate that the State not adopt legislation undercutting EPA-approved emissions standards.

3. Petitioners' assertion of preemption does not state a "claim" for purposes of the citizens' action provisions of the Clean Air Act.

Respondents argue that Petitioners lack standing to assert preemption, because they did not pursue mandatory reinstatement of the emissions testing program and did not comply with the citizens' action provisions of the Clean Air Act, 42 U.S.C. § 7604. Respondents' Brief at 17-20. To the contrary, by abandoning the request for reinstatement of the program Petitioners' avoided any possible application of § 7604. Petitioners seek damages under the common law of contracts, not reinstatement of the emissions testing program.

This Court has repeatedly held that assertion of preemption does not create a federal claim, for jurisdictional purposes. *See, e.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). Petitioners' use of preemption to strike affirmative defenses to a contract action does not generate a federal claim under § 7604, and is not subject to the procedural requirements of that section. In any event, Petitioners' contract claim is a "right . . . under common law" which is preserved by the savings clause of § 7604(e).

4. The ruling below cannot be interpreted as giving effect, as a matter of contract law, to a repeal that is void under the doctrine of preemption.

The total bankruptcy of Respondents' position is evident from its final argument, which is that the decision below allocated the risk of repeal to Petitioners "irrespective of the validity of the repeal." Respondents' Brief at 22. If the repeal is void as a matter of federal law it does not exist. Respondents therefore cannot assert the repeal as a defense, and cannot benefit from it – particularly where the Maine Legislature enacted the repealer with undisputed knowledge, on advice of the Maine Attorney General, that the repeal would violate federal law.

CONCLUSION

Each and every argument submitted by Respondents directly contradicts established federal law. The petition should be granted.

Respectfully submitted,

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